

AMO's Submission to the Elliot Lake Inquiry Policy Roundtables #1 & #2

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Association of
Municipalities
of Ontario

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Mr. Justice Paul R. Bélanger, Commissioner

Elliot Lake Commission of Inquiry
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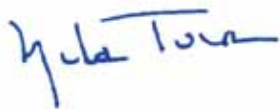
Dear Commissioner Bélanger:

The Association of Municipalities Ontario (AMO) commends the work of the Elliot Lake Inquiry established following the tragic events surrounding the June 23, 2012 collapse at the Algo Centre Mall in the City of Elliot Lake. AMO further welcomes the opportunity to participate at the Commission's policy roundtables relating to lessons learned from this incident and to explore how policies and practices may be addressed to enhance public safety and security.

AMO's mandate is to support and enhance strong and effective municipal government in Ontario and to promote the value of the municipal level of government as a vital and essential component of Ontario and Canada's political system. Municipal governments have an important role in the health, safety and well-being of Ontarians through municipal programming and through regulatory administration and enforcement; most notably in the context of building infrastructure, the Building Code, Fire Code, and municipal property standards by-laws. Municipalities are also involved in the ownership and operation of a wide array of public buildings and workplaces accessed daily by Ontarians for employment, business, recreation, culture, government services, healthcare, and housing needs. Ontario's infrastructure, both public and private, will be challenged due to increasing age and the need for modernization or replacement. It is within this context that AMO welcomes the opportunity to participate in the Commission's roundtables. Regardless of age, ownership, or location of Ontario's infrastructure, Ontarians must have confidence that infrastructure that we are in or that surrounds us is safe.

I am pleased to provide you with a staff response, developed with the assistance of a small group of municipal solicitors, to the Policy Roundtable questions, reflecting the considerations from Ontario's municipal governments. Please note that this is a staff response and has not been approved by the AMO Board or Executive. We thank you again for ensuring that representatives of Ontario's municipal governments are part of your discussion on this important matter.

Sincerely,



Monika Turner
AMO Director of Policy

Roundtable 1: Issues of Importance

Mandatory Periodic Inspection of all Buildings

Mandatory periodic inspections of buildings, particularly buildings accessible to the public and workplaces, make good public safety sense and provide Ontarians with a further degree of confidence in Ontario's infrastructure. Buildings and building related systems are becoming increasingly complex and compounded by factors such as age of the building, changing technologies, and changes in use, property ownership, and/or property management.

Certain buildings are currently subject to mandatory periodic inspections. By way of example, certain buildings are required by the Ontario Fire Code to have inspection and testing of Fire Alarm Systems in accordance with CAN/ULC S536, prepared and published by the Underwriters' Laboratories of Canada and approved by the Standards Council of Canada. Systems covered by this Standard are subjected to periodic inspection and testing (e.g. daily, monthly, and yearly). In addition, the Standard also requires a copy of the Inspection and Test report to be given to the owner or the owner's representative for the building and be kept available on site. Non-compliance with the inspection and testing requirements would constitute an offence under the Fire Code and could be subject to enforcement measures.

Municipalities are not in the position to undertake mandatory periodic inspections of all buildings. There are clear liability and resource issues associated with undertaking this responsibility.

Both the Building Code and the Fire Code place code compliance primarily upon the "owner", as defined by the respective code. A mandatory requirement for periodic inspections of the building as a whole and/or all related building systems should, consistent with the current statutory schemes, rest primarily with building owners. AMO recommends that a formula for 'checks and balances' be put in place when a preferred inspection method is put in place. This may involve having a building official undertake an inspection with a subsequent peer review within a risk management framework.

Consideration should be given to logically connecting maintenance/infrastructure inspections to already existing mandated periodic inspections/tests. Finally, focus should be given to the development of maintenance regime for buildings accessed by the public as well as workplaces. Consideration will need to be given as to how to define "public" and "workplaces". For example, are residential condominiums to be excluded? If so, the definitions could be tied to the use/occupancy provisions of the Building Code.

Mandatory Minimum Property Standards

Many municipalities in Ontario have enacted property standards by-laws under the authority of Section 15.1 of the “*Building Code Act, 1992*” (BCA). Breaches of the property standards by-law typically results in the issuance of a Property Standards Order, with an available right of appeal to a Property Standards Appeal Committee. Once an Order is confirmed, either by the passage of time or by way of an appeal to the Committee, non-compliance can result in prosecution before the Provincial Offences Court and/or the municipality correcting any deficiencies.

In addition to municipal by-laws, it is noted that the Province of Ontario has enacted maintenance standards for certain types of buildings. For example, Regulation 517/06 enacted under the *Residential Tenancies Act, 2006*, sets maintenance standards for residential rental buildings, including for example, establishing standards for structural soundness, utilities and services, and safety and security. Non-compliance with the maintenance standards can be addressed via the Landlord and Tenant Board (e.g. rent reduction issues) and/or prosecution via the *Provincial Offences Act*.

The enforcement of property standards is a complicated issue. Not all property standards by-laws seek to address questions of structural integrity. In many municipalities, the property standards by-law primarily addresses the appearance of a building and the land it is located on. Property standards issues can vary from cosmetic appearance of a building to the structural integrity of a building frame. Depending on the particular municipality and its organizational structure, responsibility for inspecting and enforcing a property standards by-law varies subject to the department and/or the professional experience and judgement of a property standards officer, a chief building official and an engineer. Not all property standards officers report to a chief building official or to an engineer.

Municipal by-laws cannot prescribe the minimum property standards that should be put in place for structural integrity. This may cause uneven standards across the Province and could create liability issues. A Property Standards By-law (“PSB”) is not the appropriate mechanism for requiring a periodic building inspection nor is a PSB the appropriate mechanism for assessing the sufficiency of the report which flows from the owner’s periodic inspection. The BCA is the mechanism that a municipality can use to get an owner to assess the structural integrity of her/his building if circumstances warrant. If the report flowing from the periodic inspection reveals a significant risk to public safety, then that report must be provided to the Chief Building Official (CBO), who will then take the appropriate steps under the BCA, to ensure public safety.

Approval of Repairs or Maintenance to Existing Buildings by a Professional

Consideration of who is responsible for the public safety of buildings is reasonable to better ensure that repairs and maintenance are being addressed and/or overseen by persons properly trained and qualified.

The *Building Code Act* (BCA) provides that both a building inspector (s.18) or a property standards officer (s.15.8), can order the property owner to take and supply (at the owner's expense) such tests and samples as are specified in the order. It is understandable to require that certain types of tests and samples be conducted by appropriate professionals. Consideration should be given to clarifying the applicable regulatory language so that work is carried out and overseen by a qualified professional. Such oversight is important because despite even best intentions on the part of property owners – insufficient work can result.

A record of remedial actions undertaken by property owners should be maintained as a matter of good property management practice by property owners themselves. This responsibility should not fall to municipalities.

Regulations Governing the Chief Building Official

The *Building Code Act* sets out powers for chief building officials to respond to both unsafe buildings (s.15.9) and emergency situations (s.15.10). The regulatory language with regards to this issue is clear. However, while such orders can address immediate human safety concerns, the structural integrity of the building may continue to be compromised as a result of delays associated with process. Delay can result from a number of factors, including protracted appeals under the *Building Code Act*, injunctive relief, heritage considerations, as well as the financial circumstances of the building owner as well as on the part of the municipality to affect repairs. Where a municipality undertakes remedial works, the *Building Code Act* requires the municipality to apply to a court to confirm the Order and that the measures taken were reasonable. This resulting court process can be lengthy.

It is suggested that additional resources be developed to help aid Chief Building Officials and Property Standards Officers.

Example:

In *The Corporation of the City of Ottawa v. TKS Holdings Inc.*, [2011] ONSC 7633, litigation ultimately confirmed an emergency order issued by the chief building official and the remedial measures/costs were confirmed in the amount of approximately \$430,000 to a downtown building after some four years following the emergency order having been issued.

Training for Building Officials

Chief Building Officials are considered *persona designata* as they derive their authority from the *Building Code Act*. Chief building officials have a semi-independent status from municipal administration as they have the power by statute to issue or not issue a building permit based on statutory conditions authority from the *Building Code Act*. Building inspectors and property standards officers exercise statutory powers which are considered more flexible in nature. Subject to policy direction that may be provided by municipal council or municipal officials, such officers would benefit from a level of operational independence in order to further the objects and purposes of the *Building Code Act* and/or a property standards by-law.

Training of property standards officers is provided by municipalities and through municipal associations, as well as through the Ontario Association of Property Standards Officers.

Training should be divided amongst the two professions as both serve a different purpose. A more systematic approach should be taken to identify the independence of Property Standards Officers' duties. For instance, a Property Standards Officer could identify issues and then refer the issue to a building official, should an issue arise (such as structural integrity) that is beyond the scope of an Officer's ability to assess. If necessary, a building official would then make the decision to call an engineer to do an assessment.

Proposed Recommendations

1. The development of a risk management framework, appropriate to buildings and structures is recommended. Public safety is of critical importance to municipal governments. However, in the consideration of any additional requirements for public safety, an objective review of whether any such activities would have had an effect on the outcome of any accident should be conducted.
2. If consistency is desired with respect to structural integrity property standards, then municipal by-laws are not the appropriate mechanisms.
3. Infrastructure should be subjected to regular and ongoing maintenance, inspections/tests, including relating to structural soundness. It should remain the responsibility of building owners to ensure that regular maintenance occurs and that accurate records of such work are maintained.
4. Initiatives and programs should be developed/enhanced with assistance of provincial and federal governments to make funding and resources available to address the challenges facing aging infrastructure.
5. Should changes be made to building/property standards, resources and supporting materials, such as guide documents, should be developed to aid Chief Building Officials and Property Standards Officers.

Roundtable 2: Issues of Importance

Secure records

It is recommended that building owners be responsible to maintain accurate and complete records of a building. A record keeping requirement is not novel for most building owners/operators. It is a responsibility as well as a benefit for an owner to keep these records. The more information that is maintained and readily accessible concerning a building's history and condition, the more information that first responders as well as officials and inspectors will have in addressing a building when an emergency occurs.

It is imperative that municipalities have timely access to information relating to a particular building. An unsafe building can have serious and longstanding impacts upon adjacent buildings, municipal sidewalks, highways, traffic, and public transit routes. An unsafe building should not be simply viewed as an issue for the building owner. An unsafe building presents issues that impact the broader community. Municipal emergency responders, officials and inspectors, as the case may be, should have timely access to information relating to the building. Consideration should be given to improving requirements for professionals, with knowledge of the building's history and condition, to provide information to relevant municipal officials without delay.

Example:

In *Gregoire v. Lauzon*, [2013] ONSC 3182, a building owner sought to prevent an engineering report relating to an unsafe building from being provided to the Chief Building Official on the basis of privilege and that the engineering report contained sensitive confidential information. In this case, the court ordered that the report be provided to the building official. Cases such as *Gregoire*, however, required recourse to the courts which can result in delays in accessing necessary information.

Requirement to Register Information/Complete an Affidavit

Information should not have to be made accessible to the public via a central registry. This may create a lot of unnecessary information, work and resources expended to which there may not be a clear public benefit. A sophisticated purchaser will seek this information and ask the necessary questions as part of a standard commercial real estate transaction. Due diligence is required by the purchaser who is considering a building for sale. Additionally, in a standard real estate transaction, a building owner will usually ensure an affidavit is complete and specify that inspections and engineering reports have been conducted.

Responsibility of Municipal Governments to Document all Oral and Written Complaints

Municipal procedures and protocols relating to by-law enforcement differ from municipality to municipality based on local operational needs and resources. While property related offences can be complaint driven, any inspection and enforcement mechanism is conducted by Property Standards Officers who are able to determine the existence and extent of any violations. Therefore, a complaint or complainant, whether known or anonymous is an irrelevant issue.

While some municipalities may require a written complaint, a concern exists that if a complainant's name cannot remain anonymous or otherwise protected by privacy legislation, then there may be reluctance by Ontarians to bring forward complaints in the first place.

Municipal governments should not be obligated to keep a public registry of all property standards bylaw violations. Again, this would create a large cost (both initially and ongoing) on municipal governments with no demonstrated benefit for the public. If specific information is sought by an individual, the individual may undertake a freedom of information request under the *Municipal Freedom of Information and Protection of Privacy Act*, (MFIPPA) .

Reporting to the Ministry of Labour

The *Occupational Health and Safety Act* ("OHS") establishes a framework that requires employers to make a workplace safe for its employees. The recent *Blue Mountain Resorts* decision of the Court of Appeal for Ontario has clarified the circumstances in which employers are required to report a critical injury or fatality suffered by a non-worker under the OHS. Employers must undertake a consideration of the hazards which caused the injury and determine whether there is a reasonable linkage to worker safety. The same process can be taken to include situations of imminent danger, accident and injury.

Municipal officials, through their activities, are responsible for the consideration of hazards which may cause accident and injury, and determining whether there is a reasonable linkage to a scenario of imminent danger so that appropriate action can be taken. With that being said, we do not believe that notice obligations should be expanded to require to a Chief Building Official to report to the Ministry of Labour on issues of imminent danger.

However, it is understood that MOL would need to investigate a post-accident scenario if there was an injury or death to a worker to ensure that a corrective action is taken. It is a further observation that MOL and the Ministry of Municipal Affairs and Housing ("MMAH") should seek to clarify their respective roles and processes as to how to best share information.